IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1865

CHARLES DEBOLES, *Petitioner*

v.

TRANS WORLD AIRLINES, INC.,
AND
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 142, IAMAW, AFL-CIO; LOCAL LODGE 1776, IAMAW, AFL-CIO, *Respondents*

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether after the Kennedy Space Center unit of Florida workers had long enjoyed the special job protection and rapid promotion benefits of separate unit seniority, the Railway Labor Act's fair representation rule required their union to bargain for them a retroactive seniority merger which would have permitted them to displace employees at other locations in the nation.

2. Whether a union official's misrepresentation to a group of Florida employees of the reason why in the new contract their national seniority merger was made prospective rather than retroactive, creates financial liability for the union where the national contract ratification ballot following the misleading statement was overwhelming and its results unaffected thereby.

COUNTER-STATEMENT OF THE CASE

In 1964 TWA was awarded the bid from the National Aeronautical and Space Administration to provide support services in Florida for space exploration, including the moon shot, at Merritt Island Launching Area (later renamed Kennedy Space Center). At the time, TWA had a collective bargaining agreement with International Association of Machinists and Aerospace Workers, AFL-CIO (114a) covering many employees on the TWA system in the aircraft industry. TWA officials approached IAM for the purpose of extending the basic labor agreement between TWA and IAM to KSC. Accordingly, a Supplement to the existing collective bargaining agreement was negotiated by TWA with IAM (P-3 at 1469a; 134a-135a; 137a-139a).

Employees of TWA at stations other than KSC prior to 1964, had "systemwide seniority" as part of their collective bargaining agreement. Under the TWA systemwide seniority, employees earn both the right to displace a less senior employee in the same classification or same location when faced with layoff, and the right to a preference bid for transfer to other jobs in the same classification at other locations on the system where vacancies exist (129a-130a). When the Supplement was negotiated in 1964 with IAM, TWA was willing to extend the basic economic provisions of the airline collective bargaining agreement to KSC, but wanted to protect the KSC work force from total integration with the system to avoid extensive turnovers from and to the system (139a-140a). TWA was concerned about the immediate as well as long range problems associated with start up of a Florida operation with a potential for as many as 2,000 jobs. The major concern was to avoid "snowbirds"—people who would bid down for the winter and bid back to the system for summer. In addition, TWA feared massive migration from any one station on the system to KSC, thereby practically eliminating the entire work force at one station, or closing it down temporarily (239a). Accordingly, the terms of the Supplement prevented system

employees from bidding for transfer to KSC on a preference bid and required any system employee who was accepted at KSC to remain for at least one year prior to bidding back on the system[1] (242a). In addition, to further discourage system transfers, TWA insisted that system employees could not exercise their system seniority at KSC for promotions, layoffs, shifts, vacations, etc. Conversely, newly hired KSC employees accrued no system seniority and had no right to bid to the system.[2]

When KSC opened, there were many higher classifications and lead position slots for which system people could not use their system seniority to bid in or advance at KSC (571a-572a). *Normally, on the system it took about eight years for an employee to reach lead mechanic or reach mechanic from stores clerk* (376a; 717a-718a). *At KSC, from 1964-1970, stores clerks rose to mechanic in seven months* (479a-480a). Seventy percent of the employees at KSC were represented by IAM, and of those, the majority of supervisory and lead jobs were held by people who were

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1. On the system there are two kinds of stations: line stations like Philadelphia and Los Angeles and overhaul bases like Kansas City Overhaul. Layoffs are seasonal in the airline industry and are heavy in winter at line stations and heavy in summer at overhaul stations (727a). Because KSC's insulation from bumping from the rest of the system was effective, KSC grew from 300 to 1200 employees and avoided the fluctuating layoffs experienced on other parts of the system (728a-729a). Thus, junior employees at KSC continued to work while their more senior counterparts elsewhere on the system were on layoff (726a).

2. Thus, in 1964, under the Supplement if a stores clerk in Los Angeles with a seniority date of March 31, 1964, sought a mechanic's opening at KSC, a KSC stores clerk with a seniority date of April 1, 1964, would have preference for that opening, despite the greater system seniority of the Los Angeles employee (244a). Similarly, the Los Angeles employee could not, in the event of a layoff displace the more junior stores clerk at KSC, while he could displace a more junior stores clerk elsewhere on the system (246a-247a).

new hires at KSC (231a-232a). TWA's insistence on and achievement of the provisions in the 1964 Supplement were designed to and in fact did produce a stable work force, not subject to the fluctuations or dislocations which were regularly experienced on the system.

In 1967 Local 773 sent a proposal to the District Lodge Convention to give KSC employees system seniority, and it was one of two KSC negotiating proposals adopted by the convention delegates (503a, 505a-508a; P-48 at 1632a). In consonance therewith, the Union's contract proposal in 1968 would have merged the KSC Supplement into the basic agreement with an extension of systemwide seniority to KSC employees (311a-312a). TWA, in its 1968 opening proposals, offered a system-seniority revision of the KSC Supplement conditioned on two years of continuous service at KSC prior to bidding out or back onto the system. The proposal would have dropped any reference to preference bids, which had been achieved in 1966 (218a-220a). William Malarkey, Chief TWA negotiator in 1968, testified that, retreating from its opening position on system seniority, TWA had tied the issue to a no-strike clause (375a-376a). TWA had further reservations about retroactive systemwide seniority during these negotiations, according to Malarkey. KSC had hired a large number of stores clerks as well as many other job classifications which were totally unknown and unused on the system. In addition, persons with job titles such as painter or welder at KSC lacked the skill to fill similar titles on the system (280a). TWA also feared that the effects of system seniority on some employees might result in the contract's rejection at a ratification meeting (324a). Thus, TWA refused systemwide seniority for KSC until all job classifications subject to transferability were worked out (371a-372a; 373a-374a).

In 1969 KSC experienced its first layoffs (355a-356a). Suddenly, stores clerks and ramp servicemen from KSC could post preference bids to come out onto the system (1109a-1110a). System employees who had been hired as

store clerks and maintenance persons saw themselves, under the proposed seniority change, subject to displacement by KSC workers who had enjoyed freedom from similar displacement by system employees (1110a). In September and October of 1969, petitions opposing retroactive system seniority arrived in IAM and TWA offices, containing some 2,900 signatures from TWA employees at Kansas City Overhaul Base, John F. Kennedy in New York, and Los Angeles (355a-356a; 1109a-1111a). The system employees' opposition was exemplified by a November 1969 petition by JFK workers (TWA-2 at 1686a) which reiterated their opposition to granting retroactive system seniority to KSC stores clerks, because a sudden space program cutback would result in mass layoffs at JFK. In addition to bumping in the event of layoffs, JFK employees and Overhaul Base employees objected that KSC employees would come onto the system with lead and classification seniority which they had earned much more rapidly than system employees (716a-717a).

The District Lodge Executive Board met in Washington, D.C. in late November, 1969. At that time, the strong opposition to system seniority at the three largest stations was reported to the Board (1056a-1057a). While members Dinkelmeyer and Celona argued for keeping the proposal on the table, the majority voted to withdraw retroactive systemwide seniority as a Union proposal (1056a-1057a; 1183a; 1185a). James Fowler of the District Lodge then proposed an alternative which is the clause that was finally adopted in January of 1970 and included in the 1970 contract. It provided for accrual of system seniority prospectively by KSC workers beginning in January of 1970 (1064a-1065a). After nearly a year and a half of negotiations, on January 13, 1970, the contract was signed by the Grand Lodge and TWA in the offices of the Federal Mediation and Conciliation Service in Washington, D.C. The contract was then submitted to the IAM-TWA membership for ratification, pursuant to an IAM regulation requiring such ratification votes.

James Fowler was assigned from District Lodge 142 to present the proposed contract for a ratification vote by many thousands of IAM's TWA members throughout the nation. At the KSC pre-ratification meetings, Fowler was questioned extensively about systemwide seniority and why it was not retroactive in the agreement (528a-530a; 927a-928a). He stated that TWA had attached unacceptable strings to that proposal including a no-strike clause and extra shifts at KSC (1115a). He said it was the best the Union could get (1115a). It is undisputed that all KSC members at the ratification meeting knew that they were not getting retroactive system seniority; they knew that people from the system could not displace them and that their own system seniority would accrue only upon ratification of the new collective bargaining agreement (1119a). Approximately 800 members attended the two ratification meetings at KSC, and cast a combined tally of 714 in favor and 69 against the contract (1119a; 1129a). A majority of all votes cast nationally in District Lodge 142 would determine ratification (1177a-1178a). *Based on the total national vote* (see D-4 at 1728a) *even if all KSC voting members had voted "no", the contract would still have been ratified by a national margin of almost 3 to 1.*

In 1971 TWA unexpectedly lost the NASA contract at KSC and many employees at KSC were laid off. Because of their January 28, 1970 system seniority, many did not have sufficient seniority to displace other employees on the system. Subsequently some of them commenced this class action to reform the 1970 contract, grant retroactive systemwide seniority, award lost back pay, reinstate, and grant attorney's fees and costs.

* * * *

A trial on the issue of liability resulted in findings and rulings which gave rise to this appeal. The District Judge

found that neither the separate seniority system established for KSC employees nor the Union's subsequent refusal to abolish it retroactively violated plaintiffs' rights under the Railway Labor Act. Thus, the Court described as follows (1387a-1388a) the separate seniority system at KSC, and the reasons for its adoption by TWA:

> "The 1964 MILA Supplement provided that new employees hired at KSC would not be listed on the system seniority roster and would not be permitted bid or displacement rights to other system locations. It also provided that system employees could bid for jobs at KSC only on a 'consideration basis,' that is, without the right to a job on the basis of seniority. System transferees could not use their system seniority for any purpose at KSC but had KSC seniority from the date of transfer. However, the system seniority continued to accrue for transferees to KSC (P-3), but they had to remain at KSC for one year before they were eligible to bid out. . . . TWA wanted to limit transfers from the TWA system to KSC to prevent wholesale and seasonal "snowbird" transfers from another station, to be able to ensure that the skills would be usable at KSC and to minimize disruption at KSC which would be caused by displacement of KSC employees . . . TWA needed a stable work force at KSC because of the vital importance of KSC to the national space program."

The Court emphasized that the separate seniority at KSC provided special benefits for the employees there. Not only were they protected from being displaced by senior employees from other locations (1388a), but "the rapid increase in the size of the work force at KSC provided promotional opportunities more rapidly than on the TWA system generally" (*id.*).

The District Court also found (1391a) that the proposal for retroactive grant of system seniority for the KSC employees met with serious opposition by members of Local Lodge 1650 in Kansas City, the largest local lodge of TWA workers, whose petitions opposing the retroactive change were prompted by "the fear of system employees that they would be subject to being bumped by KSC employees" (*id.*). Moreover, the District Court found (1391a-1392a) that when a member of the negotiating team was sent to Kansas City and New York to investigate the opposition to retroactive system seniority, he did not try to persuade employees to drop their opposition, because be believed that system seniority "would be impossible to apply retroactively and would be unfair to system employees."

On the basis of these findings, the District Court concluded (1401a) that the Union manifested no lack of unfair representation of KSC employees "in its conduct at the negotiating table." Applying the standard of this Court's governing rulings the Court (1398-1399a) found legitimate and nondiscriminatory reasons for the establishment and maintenance of the separate seniority system for the KSC employees. In particular, the District Judge found that many of the jobs at KSC involved skills that were unique to that station, which TWA chose to isolate from the rest of the system. The Court found this a legitimate consideration, which was evidenced by the endtailing of system transferees to the KSC seniority list (*id.*).

Having thus rejected plaintiffs' claim that the establishment and maintenance of the separate seniority system for KSC employees violated union duties under the Railway Labor Act, the District Court nevertheless found that the Union violated the fair representation duty by false assertions made to KSC employees prior to their vote on the ratification of the 1970 agreement. The crux of the falsehood found by the District Court (1393a) was the attempted diversion of responsibility to TWA:

> "James Fowler, Assistant Chairman of District Lodge 142, went to KSC to conduct a ratification meeting. First he met with the executive board of Local 773 and advised them that the union had done everything within its power to obtain retroactive system seniority but that TWA had attached unacceptable conditions to the proposal and that system seniority for KSC workers effective as of the signing of the agreement was the best that could be done. . . . The primary reason that the union officials did not obtain retroactive system seniority for KSC employees was the fear and the risk that the contract would not be ratified because of opposition by TWA workers at other system locations. . . . At the ratification meetings, Fowler repeated his statements that the union had done everything it could to secure retroactive system seniority, but that TWA had attached unacceptable conditions to it."

Based on this finding the District Court (1403a) held the Unions liable for "the misleading and incomplete communications from the IAM to the KSC employees." The District Judge then certified in an order of January 29, 1976 (1431a) "that the Order entered on October 31, 1975, on the issue of liability against the defendants" involves a controlling question of law, within the meaning of 28 U.S.C. §1292(b). In the accompanying opinion, the District Judge stated as follows (1424a-1425a; 1428a):

> "The basis of liability is that the union officials deceived the plaintiff class regarding the union's efforts in the negotiations to secure equal seniority rights for the Kennedy Space Center employees, and told them falsehoods just prior to the membership ratification vote on the agreement. So far as I can determine, the basis upon which liability is imposed is without controlling appellate guidance . . . .

"One possible way of stating the legal question involved is as follows:

> Is a union liable to a segment of its members because union officials lied to that segment of members concerning the union's efforts to secure certain seniority rights, in order to obtain membership ratification of a negotiated contract, where there is no proof that the contract would not have been ratified had those members been told the full truth?"[3]

The Court of Appeals answered that certified question in the negative, and it affirmed the District Court's finding that there was no discrimination in the refusal to grant retroactive seniority integration to the Space Center employees, who had enjoyed the benefits of their separate

3. While the District Judge stressed the absence of proof that the contract "would not have been ratified" had KSC members been told the full truth, it is noteworthy that many KSC employees knew the truth and were not misled by the representation made to them just prior to their balloting. Not only had KSC members been apprised months earlier of the protest petitions from Kansas City and elsewhere against retroactive seniority, they had also been told the facts both by District Lodge and TWA officials. Thus the District Judge found (1391a) that petitions against retroactive seniority were circulated throughout the TWA system in September and October of 1969; and (1392a) that when the KSC officers learned about them in the following month, KSC letters and telegrams were sent urging the opposing position. Moreover, the Court found (1392a) that a TWA official had also informed KSC officers that the company did not oppose retroactive seniority. In addition, there was no uncertainty or mistake in the mind of any KSC member as to what the contract contained. Under these circumstances, the District Court's finding of no material effect of the misrepresentation is supported both by the national vote results and the absence of proof that the KSC members were actually misled by Fowler's assertions prior to the balloting at KSC. Cf. *Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126.

seniority in the years before 1970 (Pet. A.29). In that respect, the Court of Appeals (Pet. A.34-35) agreed with the District Court that in 1964 separate seniority for the Kennedy Space Center employees was "one part of a package of special jobs stability provisions . . . many of which benefitted the appellants to the detriment of their system counterparts. Ample evidence supports the district court's finding that TWA's desire for a stable work force was the dominant motivation for the 1964 distinctions." The Court also emphasized (Pet. A.32) that under the 1964 agreement a Space Center employee was "*free from concern for losing his or her job to a non-Space Center person with greater seniority*"; that during the growth of the space effort in the 1960s, "*promotions occurred significantly more rapidly for Space Center employees than for their counterparts elsewhere in the TWA system*" (*id.*); and that "*layoffs were rare at the Space Center, in contrast to the regular TWA stations*" (Pet. A.33).

The question certified by the District Court was answered in the negative by the Court of Appeals (Pet. A.49-54) "because false statements may not create liability under the federal labor laws absent a showing of tangible injury proximately resulting from a falsehood" (Pet. A.49). The Court applied that rule here (Pet. A.39-40) under the following circumstances:

> "The 1970 contract was found to have been advantageous to the union with beneficial pension and wage improvements and a revamped procedure for grievances and arbitration. The Local 773 membership ratified the contract, despite knowledge of the lack of a favorable system seniority provision, by a vote of 714-69, and nationally the contract was ratified by an overwhelming margin. There is no evidence that the voting outcome would have been different had the members been told the truth about the union leader-

ship's unwillingness to achieve retroactive system seniority. Based on the total national vote, even if all Space Center voting members had voted "no", the contract would still have been ratified by a national margin of almost 3 to 1."

* * * *

Under these circumstances only two questions are presented to this Court.[4] The first arises from the ruling by both courts below that the Florida employees could not fairly demand to be merged into the national seniority roster retroactively rather than prospectively. The second arises upon the finding by both lower courts that the misleading statement to the Florida employees did not affect the outcome of the national ballot, and the ruling below that absent tangible injury false statements do not create union liability under federal labor laws. Neither ruling warrants this Court's grant of review.

4. All five of petitioners' "questions presented" are flawed and some clearly are not even presented. Their first question assumes union instigation of the separate seniority for Florida employees, but both courts below found it was the employer's desire which led to that arrangement. The second question is one on which the petitioners actually prevailed in the court below (see Pet. A. 51, 54) and thus clearly cannot be presented by them for this Court's review. The third question assumes fellow-employee hostility as the "sole reason" for denial of retroactive seniority whereas the courts below recognized the basic unfairness of such retroactivity. The fourth question was neither presented to nor decided by the courts below, and its attack on the Union's contract ratification practice is futile because if the Union had never invoked a ratification process the result for all the employees would have been exactly the same. The fifth question assumes for its premise a discrimination in the seniority compromise which both courts below have refused to find.

REASONS FOR DENYING THE WRIT

1. Upon a full trial of the facts, the District Judge found no discrimination in a negotiated compromise between conflicting employee interests by which the separate unit of Kennedy Space Center workers was integrated into the nationwide seniority plan prospectively but not retroactively. A unanimous Court of Appeals has affirmed that finding and there is nothing to impugn the nondiscrimination conclusion of the two courts below[5]. On the contrary, petitioners' claim is actually a demand for discrimination in their favor: they want the cake they have eaten. For many years, petitioners enjoyed the desirable work, pay, and promotion benefits at the Kennedy Space Center. When job prospects there were no longer rosy, they demanded that they be given *retroactively* the right to use the special job and promotion benefits they had won in Florida to displace workers in Kansas City, New York and Los Angeles who had enjoyed no such privileges. As a consequence, a Florida employee who had won unprecedentedly rapid promotion to higher grades within a single year (479a-480a) could have displaced an employee elsewhere who had achieved a like promotion one day later but had waited "8, 10 or 12 years to reach that same position" (717a-718a).

5. A host of rulings recognize that seniority differences and adjustments among employee groups are within the union's and employer's discretion and judgment. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Price v. International Bhd. of Teamsters*, 457 F.2d 605 (3d Cir. 1972); *Bruen v. Electrical Workers Local 492*, 425 F.2d 190 (3d Cir. 1970); *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965); *Hiatt v. New York Central R.R.*, 444 F.2d 1397 (7th Cir. 1971); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975); *Laturner v. Burlington Northern Inc.*, 501 F.2d 593 (9th Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975); *Northeast Master Executive Council v. CAB*, 506 F.2d 97 (D.C. Cir. 1975), *cert. denied*, 419 U.S. 1110 (1975).

Such a retroactive seniority integration would have discriminated against employees throughout the nation, and the lower courts have rightly declined to find that federal law requires a union and company to accede to so unfair a demand. The court below correctly ruled that there is no basis in federal law for attacking the 1970 seniority compromise, which yielded to Florida workers fully integrated seniority after January 1970 but not before.[6]

2. The court below was equally correct in ruling that no liability arises under the Railway Labor Act's fair representation duty, because no financial or other material injury flowed from the union official's attempted diversion of responsibility to the employer where the election result was unaffected thereby. The necessity for an exclusively remedial construction of the RLA is underscored by the

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6. Petitioners claim a conflict with the Second Circuit's ruling in *Jones v. TWA*, 495 F.2d 790 (2d Cir. 1974). But there the nonmembership of the complaining employees had been made the ground for their less favorable seniority. The Second Circuit's ruling was based exclusively on the rule (495 F.2d at 797) that "Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit." The ban on membership-based contract distinctions is found in express terminology of the second proviso to §8(a)(3) of the National Labor Relations Act (29 U.S.C. §158(a)(3)); in the proviso to Section 2, Eleventh (a) of the Railway Labor Act (45 U.S.C. §152 Eleventh); and in the decision in *Radio Officers v. NLRB*, 347 U.S. 17 (1954). Thus the Second Circuit took pains in *Jones* to prevent application of its ruling beyond membership-based contract differences. It emphasized that "*we do not suggest that a union has a duty to dovetail seniority when consolidating two groups of employees*," and "*hold only that union membership was not a proper ground for determining seniority*" (495 F.2d at 798). (Emphasis added.) There is thus no conflict of circuit rulings here.

numerous and definitive rulings construing analogous National Labor Relations Act provisions. Significantly, the latter statute contains a broader enforcement provision authorizing the NLRB, after finding a violation of law, to order "such affirmative action . . . as will effectuate the policies of this Act." Yet it has been repeatedly and emphatically established that even the National Labor Relations Board cannot go beyond redressing specific injuries, to impose punitive sanctions or awards.

The seminal ruling is *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). There the Labor Board had issued an order for payment to the government, by employers who had violated the statute, of amounts the employers had deducted from the back pay of wronged employees which the employees had earned on government work relief projects. This Court reversed the Board, stating (311 U.S. at 10):

> "We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme."

Equally in point is the ruling in *Local 60, United Brotherhood of Carpenters v. Labor Board*, 365 U.S. 651 (1961). There the Labor Board had found unlawful operation of a "closed shop" agreement between the union and the company, and as a part of the remedy had ordered a return by the union of the dues and fees paid by the em-

ployees. This Court rejected that as punitive rather than remedial relief, because it found no basis for the conclusion that the unlawful contract had caused or compelled the payment of the dues which the Labor Board had ordered refunded. The remedy was thus impermissible because it went beyond removing the "consequences of violation":

> ". . . . Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members; and no 'dissipation' of the effects of the prohibited action is achieved. *Labor Board* v. *Mine Workers, supra* 463. The order in those circumstances becomes punitive and beyond the power of the Board. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 10" (365 U.S. at 655).

So strong is the policy against punitive relief under federal labor laws, that it has been barred by the Congress even in the tortious damage actions authorized for secondary boycott injuries. That is the construction of § 303 of the Labor-Management Relations Act espoused by this Court in *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964). Section 303 provides that one "injured in his business or property" by the forbidden conduct "shall recover the damages by him sustained." In reversing a District Court punitive damage award this Court's opinion ruled as follows (at 260-261):

> "Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual,

> compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages."

The prohibition on punitive labor law sanctions has been applied even where, unlike here, pre-election misconduct prejudiced the vote by the employees. In *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972), the Court refused to affirm a Labor Board bargaining order imposed on an employer who had impaired the result of a Board election by discriminatorily transferring eligible voters to another location a week before the voting. The Court noted (at 442) that the violation might have been cured by the holding of a new election "free from the adverse influence of the Company's unlawful action." But (at 443) the order requiring the employer to bargain violated the rule that remedies under the statute are confined to "restoring the status quo . . . to redress the injuries done to employees." The Board's "order would not be remedial but . . . would merely punish the company for its unfair labor practice . . ." (at 444). A similar result was reached in an opinion by Chief Justice Burger (then Circuit Judge), reversing a Labor Board bargaining order which went beyond granting make-whole relief to the

employees injured by the statutory violation. *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942. The opinion (at 303, emphasis added) strongly underscores that under the federal statute governing collective bargaining the sole purpose of remedies "*is to rectify the harm done the injured workers, not to provide punitive measures against errant employers.*"

The foregoing rulings confirm that Congress under the NLRA has confined relief for misconduct which has impaired the employees' vote to the holding of a new ballot. The same limitation applies under Title IV of the LMRDA, the 1959 provision protecting the integrity of the election of union officials. Only where misconduct has affected the outcome of such an election may the Secretary of Labor initiate a judicial proceeding (29 U.S.C. §482). And under the statute the only remedy in such a case is "to set aside the invalid election" and hold "a new election under supervision of the Secretary." Nor does the Railway Labor Act provide even in the case of misconduct affecting the outcome of employee balloting any relief beyond the remedial re-balloting measure of the NLRA and the LMRDA. That is the only remedy contemplated by §2, Ninth of the statute (54 U.S.C. §152, Ninth), and the only remedy ever afforded by the National Mediation Board in those instances where its ballot of the employees was impaired by misconduct.

The NLRA and the parallel RLA are statutes wholly remedial in character; for their violation Congress has not authorized the grant of relief beyond the redress of the injury caused. As stated by Chief Judge Biggs in *United Shoe Workers v. Brooks Shoe Mfg., Co.*, 298 F.2d 277, 284 (3d Cir. 1962), "It is the general policy of the federal labor laws . . . to supply remedies rather than punishments." And as Judge Hand long ago ruled in *Western Union Telegraph Co. v. NLRB*, 113 F.2d 992, 997 (2d Cir. 1940), liability under labor law must rest on "proof that 'the unfair labor practice' actually impinged upon the

putative victims and caused them pecuniary damage." Thus, nothing in the Railway Labor Act creates liability for a misstatement to a group of employees prior to their contract balloting which did not impair the ballot result. The Court below correctly ruled (Pet. A.49) that since the misleading statement to the Florida employees could not possibly have altered the result of the overwhelming nationwide ratification vote, it could not create liability under federal labor laws "absent a showing of tangible injury proximately resulting. . . ."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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